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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. [redacted]

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET. AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the district court (J. App. J and N) [1] are reported at 364 F. Supp. 1239. The report of the Interstate Commerce Commission (J. App. B) is reported at 114 M.C.C. 571. The final order of the Commission (J. App. C) is not reported.

[1] "J. App." refers to the Joint Appendix to Jurisdictional Statements filed by the other appellants.

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321–2325, to set aside orders of the Interstate Commerce Commission. The judgment of the three-judge district court (J. App. J) was entered on September 11, 1973. An order (J. App. N) overruling and denying a motion of the United States and the Commission to amend the judgment was entered on October 4, 1973. Notice of appeal by the United States and the Commission (J. App. Q) was filed on November 9, 1973. The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *United States* v. *Dixie Highway Express, Inc.*, 389 U.S. 409; *Illinois Central Railroad Co.* v. *Norfolk & Western Railway Co.*, 385 U.S. 57; *United States* v. *Saskatchewan Minerals*, 385 U.S. 94.

QUESTIONS PRESENTED

1. Whether the district court's reversal of an Interstate Commerce Commission decision finding that certain additional motor carrier service is required by the public convenience and necessity was based upon improper standards of judicial review.

2. Whether the district court's refusal to remand the case to the Commission improperly precluded the Commission from further consideration of the substantive merits of the issues of public convenience and necessity.

STATUTE INVOLVED

Section 207(a) of the Motor Carrier Act, 49 U.S.C. 307(a), provides:

> Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied; *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

STATEMENT

In 1964 and 1965, sixteen motor carriers filed a total of twenty applications generally seeking to extend their regular route general commodity operating authorities between points in the Southeast and Southwest in order to meet the burgeoning transportation needs of the two regions' mutually dependent economies.[2] Following a prehearing conference, early in

[2] Generally, the points lie west of Atlanta, Ga., Birmingham, Ala., and Pensacola, Fla., and east of Houston, Dallas and Fort Worth, Tex., and include each of those cities. The approximate

1966, the Commission ordered ten of the applications to be heard on a consolidated record. A total of 66 competing rail and motor carriers appeared in opposition.[3]

Hearings, at which more than 900 shippers and receivers of freight testified in support of the applications, were conducted on 149 days over a period from March 1966 to August 1967. The consolidated record became "what is perhaps the most extensive record ever developed in connection with a single group of motor carrier application proceedings before this Commission" (J. App. B, p. 103). In their recommended report and order (a copy of which is included in the record which has been transmitted to this Court), two hearing examiners found that the applicants were "capable of performing the operations proposed" but concluded that each application should be denied.

The Commission, however, disagreed and, after an intensive analysis and comparison of the evidence in support of and in opposition to the applications, concluded that three of the applications should be granted. Noting (J. App. B, p. 121) that the examiners' findings with respect to shipper testimony induced an unclear picture of available service, the Commission revised those findings to reflect its different evaluation of the evidence. Other sections of the recommended report, in-

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northern boundary is a line between Topeka, Kans., and Kansas City, Mo.

[3] Each of the applicants was also a protestant to another application.

volving other issues, were specifically adopted by the Commission (J. App. B, p. 105).

The Commission found that "[t]he evidence considered in its entirety is convincing that the additional services * * * will serve a useful public purpose responsive to a public demand and need, and that available transportation services between the points and to the extent authority is granted herein are not reasonably adequate to meet the demonstrated needs of the shipping and receiving public" (J. App. B, p. 129). It found substantial evidence of general dissatisfaction with existing services because of excessive and inconsistent transit time between the two geographic areas, as well as "restrictions or embargoes which limit the service available * * * outright refusals by existing carriers to handle their traffic; pickup and delivery problems; interline difficulties relating to loss, damage, tracing, shortages, and misrouting; lost business and accounts; and customer complaints" (J. App. B, p. 130). In addition, the Commission found "a rapidly increasing demand * * * for added motor carrier service of a direct, single-line nature," and concluded that "the volume of traffic moving and to be moved within and between the considered territories supports, and the public interest requires, the issuance of somewhat competitive and overlapping authorities to Red Ball, Bowman, and Johnson" (J. App. B, p. 132).

The Commission noted that some existing traffic would be subject to possible diversion, but found that

"[w]ith the exception of one carrier * * * protestants have not shown that they would be seriously adversely affected (footnote omitted) by such grants, nor does it appear that the operations of any existing carrier would be impaired to such an extent that they would be unable to render service to the public in the future" (J. App. B, p. 157).

In the suit to set aside this decision, the district court held the orders invalid insofar as they extended the operating authorities of three carriers, Red Ball, Bowman, and Johnson; it enjoined the Commission from issuing certificates to those carriers in this proceeding. Its opinion (J. App. J) adopted, substantially verbatim, the findings and conclusions proposed by appellees (J. App. I). The court expressly refused to remand the proceedings to the Commission.

Thereafter, the government filed a motion to amend the judgment to provide for a remand of the proceeding to the Commission for further action consistent with the court's opinion. In its second opinion (J. App. N), the court denied that motion, reasoning that the applicants instead "should file new applications and present the Commission with current facts reflecting the current situation in order that the Commission might make a legally valid appraisal of the public interest in the light of such facts" (J. App. N, p. 816).

THE QUESTIONS ARE SUBSTANTIAL

In setting aside the Commission's decision, the district court unjustifiably departed from established standards of judicial review of administrative action.

The decision reflects a serious misinterpretation of this Court's opinion in *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, in violation of the established allocation of decision-making functions between reviewing courts and the administrative agencies. The court's refusal to remand the case represents an unwarranted interference with the Commission's responsibility for performance of its statutory functions, and disregards many of this Court's prior decisions.

The case is also important because a denial of these applications may have significant economic impact. This is a case of major importance to all those concerned with the movement of freight originating at, destined to, or passing through the Southeast or Southwest regions of the United States. An economic study showed that at the time the extension applications were filed there already existed "substantial trade and commerce" between the regions involved (J. App. B, p. 122). It was also noted that the population of the regions "has increased substantially between 1960 and 1970" (J. App. B, p. 123). The Commission concluded that existing service was not adequate to meet the demands of these growing areas. The Commission evaluated the transportation needs of the Southwestern and Southeastern United States in this proceeding and concluded that the issuance of these additional motor carriers' certificates is necessary to assure efficient carriage of freight between those regions. The district court's decision denies the public the benefits of that needed transportation service.

1. The district court failed to apply correct standards of judicial review for agency decisions made on the record after hearing. This Court has concluded that, to preserve the decisional responsibility of agencies, the scope of judicial review in such cases is limited. The court's function is to determine whether the agency decision is supported by substantial evidence. *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 620; *Illinois Central Railroad Co.* v. *Norfolk & Western Railway Co.,* 385 U.S. 57, 69. If the court finds sufficient evidence in the record as a whole to support the decision, then the reviewing court cannot upset the agency determination merely because it would have drawn different conclusions from the facts presented to the agency. "[I]t was not the District Court's function to substitute its own conclusions for those which the Commission had fairly drawn" (*ibid.*), because "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo, supra,* 383 U.S. at 620.

This standard of judicial review does not permit the reviewing court to determine the relative weight to be given to conflicting evidence. This Court has stressed that the requirement that a reviewing court canvass the entire record "does not furnish a calculus of value by which a reviewing court can assess the evidence." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488. The requirement does not negate the agency's fact-finding function and does not permit a court to reject an agency's choice between

two fairly conflicting views even if the court would have made a different choice if the matter had been submitted to it for *de novo* decision. *Ibid.*

The court below ignored these limitations on judicial review. It did not hold that the Commission decision is not supported by substantial evidence.[4] On the contrary, the court acknowledged that the Commission's findings are supported by portions of the record (J. App. J, p. 777). Conclusions 12–21 (J. App. J, pp. 778–784) indicate that the district court vacated the Commission's determination because it thought the Commission should have given greater weight to the contrary evidence presented by the protestants. The weighing of the evidence, however, is for the agency, not the reviewing court.

Indeed, the court below applied a novel standard of judicial review of agency determinations in adjudicatory proceedings. After reciting the substantial evidence test, the court engrafted onto that standard the additional tests of 5 U.S.C. 706(2)(A) that the action of the agency not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In using these additional tests, the court purported to rely on this Court's decision in *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402. Such reliance is misplaced.

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[4] The Commission's determination was supported by voluminous evidence. There were 482 supporting witnesses from the Southwest, 340 from the Southeast, 42 from the Midwest and 44 from the Middle Atlantic and New England states (J. App. B, p. 122).

In *Overton Park* this Court discussed the standards of review set out in Section 706 of the Administrative Procedure Act. It noted that while the substantial evidence test applies to adjudicatory proceedings (401 U.S. at 414) the agency action in dispute in *Overton Park* was "* * * not designed to produce a record that is to be the basis of agency action—the basic requirement for substantial-evidence review * * *" (401 U.S. at 415). For that reason, the test did not apply. This Court held the "arbitrary or capricious" standard applicable, but even so "[t]he Court is not empowered to substitute its judgment for that of the agency." 401 U.S. at 416. Although the question was not presented in *Overton Park,* it is clear that, absent questions of the agency's authority which are not involved here, an agency determination in adjudicatory proceedings which is supported by substantial evidence cannot properly be found to be "arbitrary or capricious."

2. The district court also exceeded its proper function in refusing to remand the case to the Commission for further proceedings—including the taking of additional evidence if the agency deems such action warranted. It is well settled that "an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 145. The reviewing court's function "ends when an error of law is laid bare. At that point the matter

once more goes to the Commission for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20.

This precept fits this case well—for the legislative delegation to decide the issue of public convenience and necessity affords "administrative discretion to the Commission, * * * to draw its conclusion from the infinite variety of circumstances which may occur in specific instances". *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65. Here, the district court found that the Commission erred because it had not given sufficient consideration to certain evidence. This finding, even if correct, should not foreclose further Commission proceedings to determine public convenience and necessity.

The district court's refusal to remand appears to be based primarily upon its conclusion that the present record is too stale to permit a realistic evaluation of present or future public convenience and necessity. But even if true,[5] this is insufficient reason for the reviewing court to require the filing of new applications and the institution of an entirely new proceeding. Rather, the appropriate course would be to remand the case to the agency for a determination of the ap-

[5] This Court has often sustained agency decisions based on records no more current than the one here involved, and indeed has emphasized that the determination whether a record should be reopened for additional evidence is a matter for the discretion of the agency. See, *e.g.*, *Northern Lines Merger Cases*, 396 U.S. 491, 520–522; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 534–536; *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503.

propriate course of action in light of the court's opinion. If additional evidence is required to bring the record up to date, the Commission should have the discretion to reopen the existing proceeding for the receipt of additional evidence, and not be forced to begin afresh with a new proceeding (in which much of the evidence already of record here would undoubtedly have to be reintroduced). A "judgment which instructs the Commission to grant relief to the appellee and precludes the Commission from reopening the proceedings for the receipt of additional evidence * * * is an improper limitation on the Commission's duty to reconsider the entire case." *United States* v. *Saskatchewan Minerals, supra,* 385 U.S. at 94–95.

The present case is similar to *Arrow Transportation Co.* v. *Cincinnati, N.O. & T.P.R. Co.,* 379 U.S. 642. There, the district court had "set aside and permanently enjoined the operation, enforcement and execution" of a Commission order. This Court summarily set aside the permanent injunction and ordered the matter remanded to the Commission without any restriction upon its power to re-examine the issues. See also *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade,* 412 U.S. 800; *Federal Trade Commission* v. *Carter Products, Inc.,* 346 U.S. 327. We believe that, at the very least, the same course would be proper here.

CONCLUSION

This appeal presents substantial questions of public importance. Probable jurisdiction should be noted.

Respectfully submitted.

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